

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 638 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

HEIR OF KASHIBEN C CHHAGANLAL D/O CHIMANLAL CHHAGANLAL

Versus

HEIRS OF BAPULAL KALIDAS

Appearance:

Shri M.T.M.Hakim for the Revisionist

Shri B.S.Patel for the respondent

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 01/09/2000

ORAL JUDGEMENT

1. This is landlord Revision under Section 29(2) of the Bombay Rent Act against Judgment and Decree of the Lower Appellate Court setting aside the Judgment and Decree of the trial Court directing eviction of the tenants - respondents from the Suit accommodation.

2. Brief facts giving rise to this revision are as under :

The deceased plaintiff - land lady Smt. Kashiben filed Suit for eviction of the defendants from the disputed accommodation on the ground of non-payment of rent for a period more than six months. The disputed accommodation was let out to the defendants on monthly rent of Rs.22/- + Rs.1/- p.m. as water tax. The defendants were required to pay rent regularly at the end of every month. They did not pay rent from 17.7.1964 to 16.1.1977 hence the amount of Rs.3450/- fell due as arrears of rent from the defendants. These arrears were deposited by the tenants in the previous Suit. However, from 17.1.1977 to 16.6.1977 the defendants again fell in arrears of rent. The demand notice was given on 18.3.1977 which was served upon the defendants, but they neither paid the rent nor vacated the accommodation in dispute hence Suit for eviction was filed.

3. The defendants contested the Suit denying the averments made in the plaint and pleaded that the notice was not properly served and it was not valid notice. They also pleaded that the contractual rate of rent at Rs.22/- p.m. is excessive and prayed for fixation of standard rent of the suit premises. They denied that they were in arrears of rent as alleged by the plaintiff. Service of notice of demand and eviction was also denied by them.

4. The trial Court found that the dispute of a standard rent raised by the defendant was barred by resjudicata inasmuch as it was already decided in Regular Civil Suit No.556/65. The trial Court further found that the defendants were in arrears of rent amounting to Rs.858/- till 16.6.1977. It was also found by the trial Court that notice was served upon the defendants and that the notice is legal. It was further found by the trial Court that the defendants were not ready and willing to pay standard rent. With these findings the Suit was decreed by the trial Court.

5. The tenants preferred an Appeal which was allowed and the Decree for eviction was set aside on the ground that the tenants had made compliance of Section 12(3)(b) of the Bombay Rent Act. The heirs of the deceased land-lady has filed this Revision.

6. I have heard Shri M.T.M. Hakim, learned Counsel for the revisionist and Shri B.S.Patel, learned Counsel for the respondents.

7. The first point for consideration in this revision is whether the case is covered by Section 12(3)(a) of the Rent Act or not. It is settled law by now that if the landlord's case is covered by Section 12(3)(a) of the Rent Act and he has successfully established the ingredients of this section then he is entitled to a decree for eviction and the Courts have no option but to decree the Suit for eviction in favour of the landlord. Shri B.S.Patel, learned Counsel for the respondent however contended that the case is not covered by Section 12(3)(a) of the Act for two reasons. Firstly that there was dispute of standard rent between the parties and secondly the rent was not payable monthly, rather it was payable annually because water tax was also to be paid by the tenants along with the rent.

8. So far as the first contention of Shri B.S.Patel is concerned I do not find any substance in it. Dispute of standard rent was raised by the tenants in the earlier Suit between the parties vide Regular Civil Suit No.556 of 1965 and in that Suit it was decided inter-parties that the standard rent was Rs.22/- p.m. + Rs.1/- p.m. as water tax. If the dispute of standard rent was resolved earlier in the Regular Civil Suit No.556 of 1965 the same dispute could not be raised by the tenants again in the subsequent suit out of which the present revision arose. The contention of Shri B.S.Patel at this stage has been that the plea of resjudicata does not bar the tenants from again raising dispute of standard rent and that it is only the Courts below which could have held that the dispute of standard rent could not be agitated again. This contention does not make any difference for the obvious reason that once the dispute of standard rent was settled between the parties earlier, on principles of resjudicata or on principles analogous to resjudicata the tenants could not have raised the same plea again and in any event the trial Court could not have decided the dispute of standard rent again more particularly when it was heard and finally decided in the previous Suit. There is nothing on record to show that the findings in

the earlier Civil Suit on standard rent were set aside by any other Court. As such mere raising of a dispute of a standard rent in the written statement filed by the tenants in the subsequent suit will not take out the case out of ambit of Section 12(3)(a) of the Act.

9. The second contention of Shri B.S.Patel has been that since the rent and water tax were payable by the tenant it does not become monthly tenancy rather it has become annual tenancy inasmuch as the water tax was payable annually no matter it was demanded and accepted by the landlord at the rate of Rs.1/- p.m. along with monthly rent. This contention also can hardly be accepted. Section 12(3)(a) of the Rent Act inter-alia says that where the rent is payable by the month and there is no dispute regarding the amount of a standard rent or permitted increase if such rent or increase are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession. The question, however, is whether the nature of monthly tenancy is changed simply because it was an obligation of the tenant to pay the water tax also. In no case the water tax is paid monthly by the landlord or the owner of the premises. On the other hand water tax is payable annually. Consequently the payment of water tax by the tenant to the landlord every month will not change the nature of the tenancy. The monthly tenancy can be created otherwise than by registered instrument, but annual tenancy cannot be created except under a registered instrument. There is no evidence on record that a registered Lease Deed or the rent note was executed in the instant case. Consequently mere payment of Rs.1/p.m. as water tax by the tenant to the landlord, on the facts and circumstances of the case, will not change the nature of tenancy from monthly to annual and as such the case cannot be said to be not covered by Section 12(3)(a) of the Rent Act. This matter was considered by the Hon'ble Supreme Court in Raju Karkara Shetty v/s. Ramesh Prataprao Shirole, reported in 1991 (1) SCC 570. It was laid down in this case that whether the education cess is payable by the tenant in addition to the standard rent under the Rent Agreement though education cess is payable by the landlord annually the parties by agreement can quantify the amount of cess to be paid month to month by the tenant provided such amount does not exceed the liability of the landlord. If the standard rent is also not in dispute and the same is payable by the month it was found that the default in

payment of rent or permitted increase for six months or more would entitle the landlord the decree for eviction u/s. 12(3)(a) of the Act. It was further laid down that where the landlord has right to recover the amount from the tenant in addition to standard rent it is open to the parties to enter into an agreement whereby the tax amount can be quantified on a month to month basis provided the amount does not exceed the tax liability of the landlord. In case of such quantification although the monthly rent payable includes monthly component of the tax it can not then be said that the rent is not payable by the month and in which case sub.section 12(3)(a) of the Rent Act would apply.

10. Shri B.S.Patel has argued that in the notice of demand the rent was demanded at the rate of Rs.22/- p.m. and Rs.1/- per month was demanded as water tax and as such the case is not covered by Section 12(3)(a) of the Rent Act. In addition to what has been held by the Supreme Court, this matter was also considered by this Court in Manilal Abhaji v/s. Swami Vaishvacharya Gura, reported in 2000(2) GLR 1191. In this case the facts were on slightly lower footing because here there was no quantification of tax liability rather it was alleged by the landlord that taxes were inclusive in the rent. However, in the absence of quantification, relying upon the Apex court pronouncement in Raju Kakara Shetty's case (supra), this Court held that it makes no difference whether the tax liability is quantified or it is not quantified and generally included in the rent. In any case the Supreme Court in Raju Shetty's case (Supra) has laid down clearly that it is open to the parties to come to an agreement whereby the tax amount can be quantified on a month to month basis. In the case before me even from the notice and the plaint allegation it can be held that the standard rent was claimed at Rs.22/- p.m. and Rs.1/- p.m. was quantified as water tax. Consequently such agreement is a valid agreement in view of the Apex Court's verdict in Raju Shetty's case (supra). If such agreement is valid then the nature of tenancy will not be changed from monthly to annual and the rent will be deemed to be payable month to month. If this is so then the case cannot be said to be not covered or governed by Section 12(3)(a) of the Rent Act.

11. As pointed out earlier if the case is governed by Section 12(3)(a) then the lower Appellate Court was bound to decree the Suit for eviction and it fell in error in dismissing the Suit for eviction. The lower Appellate Court on the facts and circumstances of the case could not have considered the protection given to the tenant

u/s. 12(2)(b) of the Rent Act when the landlord's case was fully established for the purpose of Section 12(3)(a) of the Rent Act.

12. It may also be mentioned that the view taken by the lower Appellate Court that the amended provision of Section 12(3)(b) of the Rent Act will have retrospective effect is contrary to law. The lower Appellate Court has relied upon the Judgment of this Court in Malangbhai Rasulbhai v/s. Pushpavadan Manilal, reported in 27(2) GLR 1024, wherein it was held that the amended provisions of Section 12(3)(b) of the Rent Act introduced through the Gujarat Act VII of 1995 have retrospective effect. The Division Bench of this Court in Bai Sakarbai Devraj v/s. Ibrahim Abdul Ganibhai Pankhida, reported in 1994(2) GLR 1091 over-ruling this decision has laid down that in view of the pronouncement of the Supreme Court the amended provision including deletion or the omission of the expression "regularly" is not retrospective in nature, but are merely prospective. The word "regularly" in Section 12(3)(b) was deleted by the amending Act of 1985 which came into operation on 20.3.1985 and as such this amendment could not be given retrospective effect. The Judgment of the trial Court was delivered on 12.11.1982 and since the word regularly was already there in the statute when the decree of the trial Court was passed and there was non-compliance of mandatory provision of Section 12(3)(b) of the Act the tenants could not have saved their eviction. Shri B.S.Patel, learned Counsel for the respondent further contended that since the Appeal was pending and the amendment came during pendency of the Appeal and since the Appeal is continuation of the Suit the respondents were entitled to the protection inasmuch as under the amended provision of Section 12(3)(b) of the Act would apply in the instant case. I, however, do not find force in this contention. The Appeal was no doubt pending in 1985 and was decided on 28.7.1988, but on the date when the Appeal was decided the word "regularly" was deleted from the statute book. However, this exercise is of academic value once it is held that the case is covered by Section 12(3)(a) of the Act. If this is so then the decree for eviction passed by the trial Court should have been confirmed by the lower Appellate Court. In not doing so the lower Appellate Court fell in obvious error of law and as such the revision succeeds.

13. Shri B.S.Patel, learned Counsel for the respondents, has however, requested that the respondents are poor persons and are unable to approach the Apex Court hence one year's time may be granted in order to

enable them to hand over vacant possession of the Suit premises. This request was not opposed by Shri M.T.M. Hakim, learned Counsel for the revisionist. As such the revision is allowed. The respondents are directed to hand over vacant possession of the disputed premises to the landlord - revisionist after a period of 12 months from today. In the mean time the respondents shall continue to pay mesne profits at the rate awarded by the trial Court to the revisionist on 5th day of each english calender month and shall not transfer, sublet or hand over possession of the demised premises to anybody, except the landlord revisionist, during this period of 12 months or thereafter. No order as to costs.

sd/-

Date : September 01, 2000 (D. C. Srivastava, J.)

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